



Open Meeting Law Enforcement Team – OMLET

Under the *Municipal Act, 2001*, with limited exceptions, municipalities must hold their council, local board and committee meetings in public. Since January 1, 2008, Ontarians have had the right to complain about municipal meetings they think have been improperly closed to the public. The Ombudsman investigates these complaints for all municipalities that have not appointed their own investigators.

At present, the Ombudsman is the investigator for closed meeting complaints in **199** of Ontario's 444 municipalities.

The Ombudsman's **Open Meeting Law Enforcement Team (OMLET)** reviews and investigates these complaints and works to educate the public and municipalities about the requirements for open meetings.

In 2010-2011, OMLET handled 95 cases (11 from the previous year and 84 new cases). Of these, 51 were closed, 31 were referred to investigators appointed by the municipalities, and 13 remained in progress at March 31, 2011.

The municipal elections in October 2010 resulted in changes to many local councils. In light of this, the Ombudsman's Office distributed about 9,000 copies of our guide to open meetings, the *Sunshine Law Handbook*, free of charge to every municipal councillor and clerk across Ontario, regardless of whether or not they use the Ombudsman as their investigator. The handbook reflects the Ombudsman's experience as an investigator of closed meeting complaints and includes frequently asked questions, excerpts from relevant legislation, and tips on best practices. It is also available on the Ombudsman's website.

OMLET formally investigated three cases in 2010-2011, involving closed meetings in **Mattawa** and **South Bruce Peninsula**. Reports on these investigations are available from those municipalities as well as on the Ombudsman's website. The other **48** cases were reviewed and resolved without formal investigation or the publication of formal reports. In these cases, OMLET staff reviewed relevant documentation, including meeting minutes and agendas, and communicated with municipal clerks and staff as needed to assess whether the open meeting requirements of the *Municipal Act*

were satisfied. When the Ombudsman found municipalities fell short of the Act's requirements or recommended areas for improvement, OMLET sent letters to the municipalities asking that the Ombudsman's findings and recommendations be made public at council meetings.

What follows is an overview of some of the more remarkable cases handled by OMLET in 2010-2011, as well as the common themes revealed in the 51 cases.

When is a meeting a "meeting"?

After the 2010 municipal elections, the Ombudsman received several complaints about "orientation" and "transitional" meetings that were held for newly elected and re-elected councillors. It is the Ombudsman's view that gatherings of a purely social nature are not subject to the open meeting requirements of the *Municipal Act*. However, if members of a body come together **for the purpose of exercising the power or authority of the body** or for the purpose of **doing the groundwork necessary to exercise that power** or authority, then the gathering should be considered a "meeting" and it must comply with the open meeting rules.

On **November 5, 2010**, the mayor-elect for the town of **Kearney** held a meeting at his home for newly elected council members, after the clerk confirmed with legal counsel that such a gathering would not violate the open meeting requirements. During the gathering, attendees created a list of issues to address in the upcoming term. Another meeting was held at the mayor-elect's home on **November 26, 2010**, to discuss committee appointments, changes to the municipality's voting procedure and other items. As only two of those present were serving councillors (the rest had yet to be sworn in), legal "quorum" did not exist, but clearly the meetings were not purely social. Those in attendance were setting the groundwork for future decision-making. The Ombudsman found that while technically, these meetings may not have violated the Act, they were inconsistent with its principles of transparency, accountability and openness. He encouraged all councillors to be vigilant in fulfilling the spirit of the Act in future.

The mayor-elect for the township of **Coleman** cancelled a private meeting for incoming council members at a local lodge, after concerns were raised about its propriety. However, on **November 17, 2010**, all the members of the new council met with the outgoing council members in a closed session to enable "free" discussion of various issues. There was little detail in the meeting minutes about what was discussed, but OMLET staff found at least one of the items was not identified in the resolution authorizing the closed session, and another did not fall under the permissible exceptions to the open meeting rules (e.g., discussions about legal advice or personal matters).

On **November 30, 2010**, the newly elected council for the municipality of **Powassan** met privately to discuss council priorities and committee membership. The meeting lasted two hours. Since four attendees were re-elected councillors, there was a quorum, however, there were no municipal staff in attendance, no public notice, agenda or official minutes. OMLET staff determined that while no decisions were taken at the meeting, it contravened the open meeting rules because it laid the groundwork for decision-making. The mayor disputed this finding, saying legal "quorum" didn't exist because one councillor participated in the meeting by phone. The Ombudsman noted that it is the substance of a meeting, not technicalities of quorum, that is significant. It would be absurd if municipal bodies could circumvent the law simply by having members participate in meetings by telephone. This is the very type of clandestine practice that the open meeting law was designed to prevent.

Several cases in 2010-2011 raised the issue of whether gatherings of municipal officials at restaurants and other venues constituted "meetings" that should have

been open to the public. OMLET's **South Bruce Peninsula** investigation looked into some councillors' practice of meeting at a local Tim Horton's coffee shop after their council meetings. The Ombudsman warned that while there was no evidence that these gatherings were anything other than social, such gatherings (particularly in such close proximity to official council meetings) risked attracting public speculation and suspicion, and those in attendance should be extremely careful to ensure that casual conversation does not drift into improper areas – i.e., official council business.

OMLET also reviewed an impromptu meeting at the offices of the Downtown **Oshawa** Business Improvement Area Board of Management on March 4, 2010, involving the chair, administrator and a couple of board members. During this casual gathering, the administrator briefed the others on an earlier meeting of a city committee where concerns about the board were raised. The Ombudsman found that this was an improperly closed meeting. Similarly, his **Mattawa** investigation found council had held an improper meeting on November 23, 2009 after a guided tour at the local museum, when the Mayor briefed council members about a motion to be tabled later that evening at a public meeting.

When to make “exceptions”

The Act allows nine exceptions to the rule that municipal meetings must always be conducted in public. These involve:

1. The security of the property of the municipality or local board;
2. Personal matters about an identifiable individual, including municipal or local board employees;
3. A proposed or pending acquisition or disposition of land by the municipality or local board;
4. Labour relations or employee negotiations;
5. Litigation or potential litigation, including matters before administrative tribunals, affecting the municipality or local board;
6. Advice that is subject to solicitor-client privilege, including communications necessary for that purpose;
7. A matter in respect of which a council, board, committee or other body may hold a closed meeting under another Act;
8. “Education and training” of the members of the council, local board or committee; and
9. Consideration of a request under the *Municipal Freedom of Information and Protection of Privacy Act*.



The first eight exceptions are discretionary – in other words, the municipality is not required to bar the public from sessions where such matters are discussed. (The ninth is not – in such cases, the Act says the meeting “shall” be closed.)

In many of the cases OMLET reviewed, the municipalities properly closed meetings under one or more of the exceptions. However, in some cases, they stretched their interpretation of the exceptions in order to justify closing meetings. In other cases, municipalities simply cited the wrong exception for the circumstances. The Ombudsman believes these exceptions must be narrowly construed and meetings should be open wherever possible.

Here are some of OMLET's 2010-2011 cases where these exceptions were cited:

Kearney town council resolved to discuss two issues in a closed session on August 25, 2010, on the basis that they concerned "**litigation** or potential litigation." One issue related to a lawyer's letter that threatened litigation over road closures, where there was a real possibility that legal action would be initiated. The second item concerned a rezoning application, where an appeal was possible, but legal action was not imminent. OMLET staff discussed these items with the municipality and observed that the second item lacked the degree of certainty necessary to support closing the meeting. Ultimately, the mayor had this item removed from the closed meeting agenda before it was considered.

On January 24, 2011, **Sudbury's** Audit Committee met in closed session to consider a report by the city's auditor general concerning shift trading and selling among transit workers. One of the reasons given for closing the meeting was that **personal** matters about an identifiable individual would be discussed. In fact, the discussion was quite general – no staff members were identified by name, and only two people were referenced by their titles. OMLET staff suggested to the city that the "personal matters" exception should only be used when absolutely necessary in order to protect privacy of an identifiable individual.

Sudbury's Audit Committee also used the "**security of property**" exception to justify closing the same January 24 meeting. OMLET staff observed that this was intended to refer to protection of property from physical loss or damage, not a risk of future litigation, which the committee cited in this case.

Clarence-Rockland council closed a meeting on April 12, 2010 using the **litigation** exception. In fact, the matter did not involve litigation but legal advice relating to an indemnity agreement. The resolution closing the meeting should have cited the exception for **legal advice** subject to solicitor-client privilege instead.

Hamilton council closed its February 18, 2010 meeting using the **land acquisition** exception in order to discuss potential sites for events of the 2015 Pan Am Games. The Ombudsman found that the session was properly closed under this and other statutory exceptions. However, because this issue was of significant community interest, OMLET suggested to the city that in future it should consider whether the public might be better served by discussing a matter openly rather than relying on statutory exceptions to close the doors.

Committees must be open too

While it seems clear to most municipalities that the open meeting requirements apply to council and local board meetings, confusion still exists about committees, particularly when they are ad hoc or temporary in nature. But if 50% or more of the members of a municipally created entity are also members of councils or local boards, then it should generally be viewed as a "committee," subject to the open meeting laws.

OMLET's investigation of **Mattawa** council also involved the town's Ad Hoc Heritage Committee, which was struck by town council to deal with designating an old hospital as a heritage site. Consisting of three councillors, the mayor and two members of the public, the committee followed no formal process, provided no public notice of its meetings, met in private and kept no minutes. Given the significant community interest in the development of this site, the secretive manner in which the committee operated cast serious doubt on its legitimacy. In his report, issued in December 2010, the Ombudsman found that the committee should have followed the open meeting rules. He recommended that council carefully consider whether the bodies it creates in future are required to hold open meetings and that it make members aware of this.

In the **Hamilton** Pan Am Games case, OMLET also looked at the “advisory group” created by council as part of the process of selecting a stadium site. The group had no substantive decision-making authority, but it did provide direction on key issues for future council decisions on the stadium. It did not hold public meetings or follow any of the procedures required of “committees” under the *Municipal Act* – but the Ombudsman concluded that it should have done so. OMLET advised the city to consider the open meeting requirements in forming similar bodies in future.

In **Sault Ste. Marie**, the mayor, clerk, chief administrative officer and two councillors met regularly to consider what issues should appear on council’s agenda. This “agenda setting review committee” was, the Ombudsman found, laying the groundwork for council to exercise its authority, and therefore was required to follow open meeting procedures. The council subsequently changed the composition of the committee so that agenda setting is now done only by the clerk, chief administrative officer and mayor, which is in line with processes followed by other municipalities.

Last-minute changes

A frequent complaint in OMLET cases involves last-minute additions to the posted agendas of closed meetings. An extreme example of this occurred in **South Bruce Peninsula**, where the town council added items to closed meeting agendas in June and September 2009 without any prior notice or approval by a majority of council, as required by the town’s own procedure by-law. In one instance, a motion was brought in closed session to remove the mayor from a negotiating team (the mayor was not at the meeting). The Ombudsman found the town had breached the *Municipal Act* and stressed that only matters of real urgency should be added to a closed meeting agenda, and only if appropriate procedures are followed.

Outside parties

Latchford town council held a closed meeting for the purposes of “education and training” of its members on January 9, 2011. The session included a local chartered accounting firm and focused on things like budgeting, taxation and financial statements. Although the Ombudsman found the meeting was legitimately closed under the “education” exception, council had completely overlooked the requirements for holding such a session – it gave no notice, did not pass an authorizing resolution and kept no formal record of the meeting. OMLET staff also advised the town that closed meetings including people from outside the council have the potential to create public suspicion, particularly when council fails to provide an explanation.

Changing the rules

Latchford council also passed its own by-law provisions relating to closed meetings, including its own process to screen complaints before forwarding them to the Ombudsman. According to the town’s by-law, all closed meeting complaints were first to be presented to council for a ruling, and passed on to the Ombudsman only if the complainant was dissatisfied with council’s findings. In addition, if the Ombudsman did not support the complaint, the town would investigate any future complaints by the same person to determine if they were frivolous or vexatious. The Ombudsman advised the town that none of this is allowed. The process for closed meeting investigations is set out in the *Municipal Act* and *Ombudsman Act* and can’t be modified by a municipality. All complaints go directly to the Ombudsman’s Office and are confidential. The Ombudsman also has discretion to decide not to investigate, if he considers the complaint to be frivolous or vexatious, and there is no charge to municipalities or to complainants for the Ombudsman’s services. OMLET staff asked Latchford to amend its bylaw and ensure it follows the Ombudsman’s processes.

Voting behind closed doors

Voting in a closed meeting is prohibited unless it is for a procedural matter or for giving directions or instructions to municipal officers, employees or agents. In a number of OMLET's cases in 2010-2011, directions and instructions were given to staff in a closed meeting, but there was no formal process or record of how this was accomplished. The Ombudsman suggested to a number of municipalities that as a best practice, a formal vote should be taken and recorded whenever direction or instructions are given in these circumstances.

At a closed session on January 19, 2010, the **Gravenhurst** council directed municipal staff to respond to a complaint, without taking and recording a vote. The council's treatment of the complaint in closed session resulted in a complaint to the Ombudsman. OMLET staff suggested to the town that following a more formal voting practice might avoid any misunderstandings amongst councillors and staff about the direction given. OMLET made similar comments to **Seguin** township council, which had instructed staff to respond to a taxpayer at a closed meeting on September 7, 2010. **Temiskaming Shores** council was also advised that the resolution it passed in closed session on December 15, 2010 should have been more clearly worded to indicate that it was a direction to staff rather than a substantive decision on a re-engineering plan, which could only be made in open session.

Some municipalities were found to have contravened the *Municipal Act* by voting in closed session. The Ombudsman's investigation of **South Bruce Peninsula** town council found that the members in attendance at the September 22, 2009 closed session conducted an illegal vote on removing the mayor from a negotiating team. **Nairn and Hyman** township council improperly voted *in camera* on October 4, 2010 on reprimanding councillors. And on February 10, 2011, the **Amherstburg** town council held a "show of hands" in closed session to change its by-laws regarding donations. Even such informal votes are, in the Ombudsman's view, improper under the Act.

Public notice

The Ombudsman and OMLET staff encouraged municipalities in 2010-2011 to provide advance public notice of all items to be considered in both open and closed sessions, and to make provision for such notice in their procedure by-laws. In some cases, we found that municipalities did not require public notice of all meetings, including those called for special purposes, as required by the *Municipal Act*. We encouraged them to ensure that this was corrected.

Keeping records

The *Municipal Act* requires that a record be kept, "without note or comment," of all resolutions, decisions and other proceedings of municipal bodies, whether meetings are open to the public or not. In a number of closed meetings reviewed by OMLET in 2010-2011, we discovered that the record of the session was inadequate, or non-existent. Municipalities often advised us that they only recorded decisions taken in closed session and nothing else, out of concern about the legislative admonition not to record "notes or comments." While subjective or personal reflections should not be included in a meeting record, it should contain a description of the general nature of what was discussed and what action was taken. In his reports on his investigations in **South Bruce Peninsula** and **Mattawa**, the Ombudsman provided a summary of what an ideal meeting record should include. He also recommended that municipalities report publicly, at least in a general way, what has transpired in closed sessions to foster greater openness and transparency.